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IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No. 541

TURNER COUNTY, SOUTH DAKOTA
Petitioner
vs.
FLOYD MILLER
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Petitioner seems to misapprehend the function of certiorari in this Court.

It is settled that certiorari is granted only when it is desirable in the public interest, and that the writ is not issued to review fact questions.

Rule 38, Paragraph 5 of Rules of this Court, effective February 27, 1939; *Magnum Import Co. v. Coty*, 262 U. S. 159, 43 S. Ct. 531, 67 L. Ed. 922; *Layne & Bowler Corporation v. Western Well Works*, 261 U. S. 387, 43 S. Ct. 422, 67 L. Ed. 712; *Southern Power Co. v. North Carolina Public Service Co.*, 263 U. S. 508, 44 S. Ct. 164, 68 L. Ed. 413; *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 58 S. Ct. 849, 82 L. Ed. 1273.

We shall, therefore, ignore Petitioner's argument to the effect the evidence herein did not sustain the judgment, and deal only with Petitioner's contentions that the Court of Appeals decision is in conflict with South Dakota Supreme Court decisions, and that there has been such a departure from the usual course of judicial procedure as to require correction from this Court.

These will be treated under appropriate subheadings. "R" in parentheses followed by an Arabic numeral will denote the page of the record to which reference is made.

ALLEGED CONFLICT

As appears from the opinion of the Court of Appeals (R 414-432), that Court followed *Clementson v. Union County*, 63 S. D. 104, 256 N. W. 794 as establishing the basic principles on which Petitioner's liability was predicated.

The gist of Petitioner's contention is that the *Clementson* case has been so modified by *Reaney v. Union County*, 69 S. D. 302, 10 N. W. (2d) 762 (opinion adhered to on rehearing 69 S. D. 488, 12 N. W. (2d) 14) and *Williams v. Wessington Township*, 70 S. D. 75, 14 N. W. (2d) 493, as to be no longer applicable to vital questions here involved.

Specifically, Petitioner asserts that contrary to the *Clementson* case, the *Reaney* and *Williams* cases made it immaterial whether or not Petitioner kept the bridge in question in proper repair, and that there would be no liability unless there was actual, as distinguished from constructive notice of the allegedly dangerous condition.

In so contending, Petitioner tries to read into the *Reaney* and *Williams* cases things which simply are not there.

By comparison of the *Clementson* and *Reaney* cases it will be found that all the *Reaney* case holds is that due to a change in the applicable statute, a county is no longer liable for injuries resulting from a highway or bridge defect which is inherent in the original construction. There is not even a hint that liability may not be based on failure to keep the structure in proper repair. The controlling statute, Section 28.0913 of the South Dakota Code of 1939, printed at Pages 38-39 of Petitioner's brief, makes it manifest no court could

reach the conclusion asserted by Petitiiner. The statute is that if a "bridge shall become . . . out of repair . . . to such an extent as to endanger the safety of public travel," liability exists for any resulting injury if barricades are not placed within twenty-four hours after "notice" to the governing body under statutory duty of maintenance.

Whether the notice required must be actual, or whether it may be constructive, was decided by the *Clementson* case, wherein it was held constructive notice is sufficient. There is no suggestion in the *Williams* case that this is overruled. On the contrary, the *Williams* case cites the *Clementson* case with apparent approval, and discusses what circumstances are sufficient to show constructive notice. All that the *Williams* case holds is that the governing body has twenty-four hours after notice in which to act, and that there can be no liability for failure to act earlier.

On the question whether constructive notice was shown, the trial court and Court of Appeals followed the well established rule, supported by South Dakota and other decisions, to the effect that the governing board of a public corporation charged with the duty of maintaining a public way, has constructive notice of any defect which would have been discovered if such duty had been adequately performed by such governing body and its subordinate officers and employees. *Gellenbeck v. City of Mobridge*, 40 S. D. 157, 166 N. W. 631; *Smith v. City of Yankton*, 23 S. D. 352, 121 N. W. 848; *Schuler v. City of Mobridge*, 44 S. D. 488, 184 N. W. 281; *District of Columbia v. Woodbury*, 136 U. S. 450, 10 S. Ct. 990, 34 L. Ed. 472; *Handy v. Meridian Township*, 114 Mich. 454, 72 N. W. 251; *Moore v. Kenockee Township*, 75 Mich. 332, 42 N. W. 944; *Johnson v. Iron River*, 149 Wis. 139, 135 N. W. 522; *Thomas v. City of Flint*, 123 Mich. 10, 81 N. W. 936; *Waud v. Polk County*, 88 Iowa 617, 55 N. W. 528.

It is clear the Court of Appeals applied the local law as such local law has been enunciated by the South Dakota Supreme Court. The conflict asserted by Petitioner is fanciful, not real.

ALLEGED DEPARTURE FROM USUAL COURSE OF JUDICIAL PROCEEDINGS

Petitioner's contentions in this respect are also unsubstantial. So far as concerns the alleged misconduct of Respondent's counsel, Petitioner simply failed to follow the well established rule for preservation of this question for review as a matter of right.

More than twelve years ago — on April 20, 1936 — the Court of Appeals for the Eighth Circuit, in *London Guarantee & Accident Co. v. Woelfle,* 83 F. (2d) 325, 344 announced:

> "In the future, to secure from this court, as a matter of right, a reversal of a judgment because of improper remarks of counsel in an argument made to a jury, *the bill of exceptions must contain all arguments in full* and must show, either that adequate objections and exceptions to rulings thereon were taken during the argument complained of, or that such remarks were specifically excepted to at the close of the argument. While failure of a party to take proper exceptions will not deprive this court of its power to grant a new trial in the public interest, we think there is no reason why that power should be exercised in such a case except under th most unusual circumstances." (Emphasis supplied.)

The rule has frequently been reiterated since then, the last time as late as October 27, 1947.

Chicago & N. W. R. Co. v. Kelly, 84 F. (2d) 569, 575; *Thomson v. Boles,* 123 F. (2d) 487, 496; *Gantz v. United States,* 127 F. (2d) 498, 504; *Palmer v. Miller,* 145 F. (2d) 926, 931; *Chicago & N. W. R. Co. v. Green,* 164 F. (2d) 55, 64; *Fleming v. Husted,* 164 F. (2d) 65, 68.

There was, accordingly, no excuse for failure to follow this rule on the part of any litigant who felt he had for presentation any such question that really warranted appellate attention.

The same practice exists in the Tenth Circuit. *Pietch v. United States,* 110 F. (2d) 817, certiorari denied 310 U. S. 648, 60 S. Ct. 1100, 84 L. Ed. 1414; *Metropolitan Life Ins.*

Co. v. Banson, 106 F. (2d) 561. This is also true in the Second Circuit. *Vause v. United States,* 53 F. (2d) 346, 354, and *United States v. Dilliard,* 101 F. (2d) 829, 837.

That such procedural rule is sound is nicely illustrated by *United States v. Socony Vacuum Oil Co.,* 310 U. S. 150, 60 S. Ct. 811, 84 L. Ed. 1129. There this Court held that certain statements of counsel, standing by themselves, appeared "highly improper," but that "a reading of the entire argument before the jury leads to the firm conviction that the comments which respondents now rely on for their assertions of error were isolated, casual episodes in a long summation of over 200 printed pages and not at all reflective of the quality of the argument as a whole."

The alleged misconduct (R 245-246) was obviously of such character that whether or not there was impropriety, and if so, whether it was prejudicial, would be dependent on the entire context of the arguments made, just as it did in the *Socony Vacuum Oil* case.

So far as concerns the claimed restriction of cross-examination, the record speaks largely for itself. Petitioner was allowed wide latitude, of cross-examining and recross-examining witnesses, to the extent of much repetition. (R 44-53, 59-62, 65-67.)

On analysis most of Petitioner's complaints in this respect are trivial.

One is because the trial court sustained an objection when Plaintiff was asked on cross-examination if his tires would leave skid marks on the bridge without the brakes applied. It was in the record without dispute that the weather was frosty, such as to leave tire marks visible (R 18). Obviously the question called for speculation and conclusion.

Another complaint is that Petitioner was not permitted to cross-examine as to an alleged discrepancy in Respondent's testimony as to the distance a car was behind him. The only basis for any estimate was the reflection in Respondent's windshield of the lights of the car in the rear (R 47). Obviously any estimate would be a guess, and the trial court was within its discretion in holding any such minor discrepancy had no tendency to show untruthfulness or unreliability.

Another complaint reduces itself to a quibble on nomenclature. In his trial testimony Respondent told of a bump as the bridge went down under him (R 39), while in a pre-trial examination he did not speak specifically of a bump, but of feeling "the drop" (R 47-48), which would necessarily include a bump. The trial court held this was not such a discrepancy as could be used as impeachment.

The complaint by Petitioner commencing at the middle of Page 24 of its brief reduces itself to nothing whatever. After considerable contention as to the state of the record, Petitioner was permitted to introduce the impeaching testimony offered (R 51). The same is true as to the complaint in the paragraph commencing at the bottom of Page 24 of its brief (R 69).

As to the complaint made by Petitioner in the two paragraphs in the middle of Page 25 of Petitioner's brief, reference to the record will show the attempted cross-examination unfair. The witness, Willard Miller, had testified on cross-examination that the bridge floor did not *at all times* look flat ahead as if he could have driven right across (R 69). Impeachment was attempted on a portion of the pre-trial statement wherein the witness said that "at that time," obviously referring to when he went onto the bridge, the floor looked flat ahead and as if he could have driven right across (R 69).

As to the complaint on Page 27 of Petitioner's brief as to restriction of the cross-examination of Respondent's witness McWayne, all that this involves is that the trial court would not permit a question as to whether a specified part from the wrecked bridge was in a certain yard, when the witness had already been cross-examined as to this, and the question represent mere repetition. (Compare R 139 with R 140.)

The alleged misconduct of the trial court was as to a statement made while Petitioner's expert witness Giertsen was on the stand. Mr. Giertsen was asked as to the relative strength of the hip rods in the hanger plates at what had been referred to as Point 1 and Point 2 (R 239). After answering that it was "about one to three," he then went on to repeat what he had previously testified (R 238), which was that hip rods

were the weakest point in the structure, and that the rods were three-quarters of an inch in diameter. Respondent objected that this was repetition, and the court sustained the objection. The witness then interjected, "I don't think it is," with the court responding "I said it was." (R 239.) The court's ruling was correct, and if trial decorum is to be preserved, witnesses may not be permitted to argue with the judge.

There is nothing here at all comparable to any case in which this court has granted certiorari on the ground alleged. Petitioner relies on *Alford v. United States,* 282 U. S. 687, 51 S. Ct. 218, 75 L. Ed. 624; *District of Columbia v. Clawans,* 300 U. S. 617, 57 S. Ct. 660, 81 L. Ed. 843; *New York Central Ry. Co. v. Johnson,* 279 U. S. 310, 49 S. Ct. 300, 73 L. Ed. 706; and *Berger v. United States,* 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314.

In the *Clawans* and *Berger* cases certiorari was granted on other grounds. On the resulting review, error was held to have been committed in each case for flagrant infringement on the rights of a person on trial for alleged crime.

The *Alford* case, also criminal, disclosed a complete shutting-off of all right of cross-examination on a matter vital to the defense.

In the *Johnson* case defense counsel in a personal injury suit had asked questions which sought to develop whether the claimed disability was from syphilis, rather than from the accident. Counsel for the plaintiff made to the jury a highly inflammatory address, charging defense counsel with besmirching the plaintiff, with misstatements to the effect that the alleged syphilis was the defense, et cetera.

It is clear that in this case the Court of Appeals has not so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for exercise of this Court's power of supervision. Petitioner's contentions in this respect are a pretext rather than a reason for certiorari.

CONCLUSION

All that here appears is that Petitioner wants still further appellate review. Petitioner has shown nothing to indicate that the public interest requires such further review.

Whether or not Petitioner was liable to Respondent depends entirely on local law. This is solely for the Legislature and the courts of South Dakota to determine. The Court of Appeals followed the law as locally established. As to the alleged misconduct of the trial court and Respondent's counsel, and alleged restriction of cross-examination, the most that can be said is that those questions were such as were proper for appellate review, and such review has been had.

Respectfully submitted,

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